RECORD AND BRIEF

Nos. 16-476 & 16-477

Supreme Court, U.S.
FILED
NOV 14 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE AMERICAN GAMING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JONATHAN F. COHN*
BRIAN P. MORRISSEY
DANIEL J. HAY†
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
(202) 736-8000
jfcohn@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

November 14, 2016

[Additional information on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress

† Mr. Hay is admitted only in New York and is practicing law in the District of Columbia pending admission to the D.C. Bar and under the supervision of principals of the firm who are members in good standing of the D.C. Bar.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
I. PASPA FORCES STATES TO ENFORCE A FAILED FEDERAL PROHIBITION ON SPORTS BETTING	6
II. PASPA PREVENTS STATES FROM COMBATING ILLEGAL GAMBLING AND ORGANIZED CRIME	11
A. PASPA Has Enabled A Thriving And Dangerous Black Market For Illegal Sports Betting	11
B. Public Attitudes Have Shifted In Favor Of Legalized Sports Wagering	14
C. A Blanket Prohibition On Sports Betting Interferes With States' Traditional Authority Over Gaming	18
D. The Third Circuit's Decision Creates Uncertainty That Will Deter States From Attempting Popular And Necessary Regulatory Reforms	19
CONCLUSION	23

TABLE OF AUTHORITIES

CASES — Page

Alden v. Maine, 527 U.S. 706 (1999) 6
Conant v. Walters, 309 F.3d 629 (9th Cir. 2002) 10
Coyle v. Smith, 221 U.S. 559 (1911) 7
FERC v. Mississippi, 456 U.S. 742 (1982) 6, 7
Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 18
Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 7
New York v. United States, 505 U.S. 144 (1992) ..... *passim*
Printz v. United States, 521 U.S. 898 (1997) 4, 7
Reno v. Condon, 528 U.S. 141 (2000) 3, 7
South Carolina v. Baker, 485 U.S 505 (1988) 3, 7
United States v. Butler, 297 U.S. 1 (1936) 10

STATUTES

18 U.S.C. § 1084 18
§ 1955 18
28 U.S.C. § 3701 *et seq.* 1
§ 3702(1) 8

LEGISLATIVE HISTORY

S. Rep. No. 102-248 (1991) 11

SCHOLARLY AUTHORITY

Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 Harv. J. Sports & Ent. L. 277 (2016) 22

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

Page

The Federalist No. 15 (A. Hamilton) (Clinton Prossiter ed., 1961) 6

Gross Annual Wager, Int'l Gaming & Wagering Bus. Mag., Aug. 5, 1994 17

Jay S. Albanese, *Illegal Gambling & Organized Crime: An Analysis of Federal Convictions in 2014* (2015), http://stopillegalgambling.org/aga-assets/uploads/2016/03/Albanese_Illegal_Gambling_OC_Report_2014_cases_FINAL.pdf 13

Fact Sheet, Am. Gaming Ass'n, 80% of Super Bowl Viewers Say: Change Sports Betting Law (2016), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/56ba21980442623 74b0347db/1455038873445/AGA+Sports+Betting+Fact+Sheet+.pdf 2

Press Release, Am. Gaming Ass'n, March Madness Betting To Total $9.2 Billion This Year (Mar. 14, 2016), https://www.americangaming.org/newsroom/press-releasess/march-madness-betting-total-92-billion-year 12

Fact Sheet, Am. Gaming Ass'n, Sports Betting FAQs (2016), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/56ba2181e707eb3d66686949/1455038849402/AGA-SportsBettingInAmerica-FAQ.pdf 12

Am. Gaming Ass'n Illegal Gambling Advisory Bd., *Law Enforcement Summit on Illegal Sports Betting: After-Action Report* (2015) 13, 14, 20

TABLE OF AUTHORITIES—continued

Page

Joe Drape, *Cash-Hungry States Eye Sports Betting, to Leagues' Dismay*, N.Y. Times (Mar. 27, 2013), http://www.nytimes.com/2013/03/28/sports/more-states-look-to-get-in-the-sports-betting-game.html 17, 21

Fortune Mag., *Fortune 500*, http://beta.fortune.com/fortune500/list (last visited Nov. 14, 2016) 12

The Mellman Grp., *National Super Bowl Survey* (Jan. 25–28, 2016) 16

Memorandum from The Mellman Grp. to Am. Gaming Ass'n, Executive Summary of Our Recent Super Bowl Polling (Feb. 2, 2016), https: //static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/56b53fb8f8baf38a1584cb20/1454718905429/16mem205-f+ public+Super+Bowl.pdf 15, 16

Nat'l Gambling Impact Study Comm'n, *Final Report* (1999), http://govinfo.library.unt.edu/ngisc/reports/2.pdf 12

Nielsen Sports, *Legal Sports Betting: What It Would Mean for NFL TV Partners & Advertisers* (Sept. 2016), https://www.americangaming.org/sites/default/files/Nielsen_NFL_Betting.pdf 16

Pew Research Ctr., *Gambling: As the Take Rises, So Does Public Concern* (May 23, 2006), http://www.pewsocialtrends.org/files/2010/10/Gambling.pdf 15

TABLE OF AUTHORITIES—continued

Page

Ben Rothenberg & James Glanz, *Match-Fixing Suspicions Raised at Australian Open After Site Stops Bets on Match*, N.Y. Times (Jan. 24, 2016), http://www.nytimes.com/2016/01/25/sports/tennis/match-fixing-australian-open-mixed-doubles-betting.html 20

State Task Force on Internet Gaming & Sports Betting, *Report on Internet Gaming and Sports Betting* (Dec. 2014), http://msgaming.org/wp-content/uploads/2015/05/MGHA-Report-on-Internet-Gaming-and-Sports-Betting.pdf 21

Brian Tuohy, *Larceny Games: Sports Gambling, Game Fixing and the FBI* (2013) 20

Daniel L. Wallach, Introduction, Game-Changers: The States' Big Gamble on Legalized Sports Betting (Aug. 10, 2014), http://www.bplegal.com/webfiles/pdf/game_changer.pdf 17, 20

INTEREST OF *AMICUS CURIAE*[1]

The American Gaming Association (AGA) is a non-profit trade association whose members participate in the U.S. commercial and tribal gaming industry, a highly regulated, $240 billion industry that supports 1.7 million jobs and provides $38 billion in tax revenue across forty States. On behalf of its members, the AGA works with law enforcement, elected officials, and regulatory agencies to combat illegal gambling and promote next-generation regulatory regimes.

The AGA is particularly concerned with the prevalence of illegal sports gambling in the United States, much of which takes place undeterred by the failed Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et seq.* This federal law prohibits all but four States from authorizing or licensing sports betting in any form, and prohibits all States but Nevada from allowing traditional, single-game sports betting. As interpreted by the Third Circuit, PASPA leaves States with few, if any, options to alter the state gambling laws prohibiting sports betting that existed in 1992 when PASPA was enacted.

But, rather than reduce sports betting, PASPA has simply allowed it to flourish underground, benefitting criminal elements and creating a thriving black mar-

---

[1] Pursuant to Rule 37.6, the AGA affirms that no counsel for a party authored this brief in whole or in part and that no person other than the AGA, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the AGA's intention to file this brief. The parties have consented to the filing of this brief, each in a separate writing that is being filed concurrently with this brief.

ket. Since PASPA's enactment, trillions of dollars have been wagered illegally on sporting events. In the last Super Bowl alone, $4.2 billion was wagered, and 97% of those bets were made illegally. Fact Sheet, Am. Gaming Ass'n, 80% of Super Bowl Viewers Say: Change Sports Betting Law 1 (2016), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/56ba2198044262374b0347db/1455038873445/AGA+Sports+Betting+Fact+Sheet+.pdf. Much of this revenue generated by illegal sports gambling is used to fund organized crime and other illicit activity, such as drug and human trafficking, money laundering, and racketeering.

The AGA—like the majority of sports fans and many leaders in law enforcement—believes it is time to reexamine the nation's outdated sports-betting laws. Through its Sports Betting Task Force and Illegal Gambling Advisory Board, the AGA has proposed legal and regulatory reforms to combat illegal gambling markets through tough and sensible regulation. Replacing the black market with a regulated industry will better protect consumers and the integrity of professional and amateur sports while generating billions of dollars in tax revenue to benefit local communities.

PASPA, as interpreted by the Third Circuit, forecloses States from devising effective, modern regulations to address sports betting—and, in the process, commandeers the States' legislatures and enforcement apparatuses. This commandeering severely hinders the AGA and its members in their efforts to make sports betting safer and more transparent. It is also patently unconstitutional, necessitating this Court's immediate review.

SUMMARY OF THE ARGUMENT

The fundamental legal question presented by these Petitions is whether a federal court can, consistent with federalism and dual sovereignty, enjoin a State from passing a law that neither violates the Constitution nor addresses any matter preempted by federal law. The Third Circuit's conclusion that federal courts have this unprecedented power is irreconcilable with this Court's well-established anti-commandeering jurisprudence, and severely detrimental to state efforts to combat sprawling black markets for illegal sports gambling. The Petitions, therefore, present a question of exceptional national importance requiring this Court's intervention.

I. This Court has consistently held that the federal government may not "compel the States to require or prohibit" certain acts, *New York v. United States*, 505 U.S. 144, 166 (1992), nor "control or influence the manner in which States regulate private parties," *South Carolina v. Baker*, 485 U.S 505, 514 (1988), nor "require the States ... to regulate their own citizens," *Reno v. Condon*, 528 U.S. 141, 151 (2000). Thus, past attempts to coerce States into implementing federal law have been struck down as violative of the Tenth Amendment and principles of federalism.

PASPA does exactly that. As interpreted by the Third Circuit, PASPA requires forty-six States to maintain and enforce state laws prohibiting sports betting that were on the books at the time of PASPA's adoption in 1992—regardless of public opinion or the law enforcement or economic needs unique to each State. While Congress could have regulated or prohibited sports betting as a matter of federal law, it chose not to. Instead, PASPA in effect ensures that sports betting continues to violate *state law*.

ket. Since PASPA's enactment, trillions of dollars have been wagered illegally on sporting events. In the last Super Bowl alone, $4.2 billion was wagered, and 97% of those bets were made illegally. Fact Sheet, Am. Gaming Ass'n, 80% of Super Bowl Viewers Say: Change Sports Betting Law 1 (2016), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23c/t/56ba2198044262374b0347db/1455038873445/AGA+Sports+Betting+Fact+Sheet+.pdf. Much of this revenue generated by illegal sports gambling is used to fund organized crime and other illicit activity, such as drug and human trafficking, money laundering, and racketeering.

The AGA—like the majority of sports fans and many leaders in law enforcement—believes it is time to reexamine the nation's outdated sports-betting laws. Through its Sports Betting Task Force and Illegal Gambling Advisory Board, the AGA has proposed legal and regulatory reforms to combat illegal gambling markets through tough and sensible regulation. Replacing the black market with a regulated industry will better protect consumers and the integrity of professional and amateur sports while generating billions of dollars in tax revenue to benefit local communities.

PASPA, as interpreted by the Third Circuit, forecloses States from devising effective, modern regulations to address sports betting—and, in the process, commandeers the States' legislatures and enforcement apparatuses. This commandeering severely hinders the AGA and its members in their efforts to make sports betting safer and more transparent. It is also patently unconstitutional, necessitating this Court's immediate review.

SUMMARY OF THE ARGUMENT

The fundamental legal question presented by these Petitions is whether a federal court can, consistent with federalism and dual sovereignty, enjoin a State from passing a law that neither violates the Constitution nor addresses any matter preempted by federal law. The Third Circuit's conclusion that federal courts have this unprecedented power is irreconcilable with this Court's well-established anti-commandeering jurisprudence, and severely detrimental to state efforts to combat sprawling black markets for illegal sports gambling. The Petitions, therefore, present a question of exceptional national importance requiring this Court's intervention.

I. This Court has consistently held that the federal government may not "compel the States to require or prohibit" certain acts, *New York v. United States*, 505 U.S. 144, 166 (1992), nor "control or influence the manner in which States regulate private parties," *South Carolina v. Baker*, 485 U.S 505, 514 (1988), nor "require the States ... to regulate their own citizens," *Reno v. Condon*, 528 U.S. 141, 151 (2000). Thus, past attempts to coerce States into implementing federal law have been struck down as violative of the Tenth Amendment and principles of federalism.

PASPA does exactly that. As interpreted by the Third Circuit, PASPA requires forty-six States to maintain and enforce state laws prohibiting sports betting that were on the books at the time of PASPA's adoption in 1992—regardless of public opinion or the law enforcement or economic needs unique to each State. While Congress could have regulated or prohibited sports betting as a matter of federal law, it chose not to. Instead, PASPA in effect ensures that sports betting continues to violate *state law*.

This distinction is constitutionally dispositive. Whereas federal prohibitions are enforced by federal agencies expending resources, state prohibitions are the responsibility of the States. By paralyzing States' efforts to modernize their sports-betting laws, PASPA commandeers the States to maintain laws and enforcement mechanisms that their citizens may prefer to abolish. Congress has no authority to dictate state law in this manner. *See, e.g., Printz v. United States*, 521 U.S. 898, 904–05 (1997).

The Third Circuit concluded that PASPA does not unconstitutionally commandeer state legislatures because it does not "*require* or coerce the states to lift a finger" or "take affirmative action" to *enact* any particular state law. Pet. App. 23a, 156a. To the contrary, PASPA violates the Tenth Amendment precisely because it prevents States from repealing or amending their own laws that their citizens no longer support. Just as Congress cannot force a State to regulate its own citizens, the federal government cannot prohibit a State from deregulating its own citizens.

II. Not only is PASPA unconstitutional; it deprives States of vital tools needed to combat the thriving and violent black market for illegal gambling. As construed by the Third Circuit, PASPA forces States to maintain laws that were unwise in 1992 and are dangerously outdated today. This creates at least four significant problems.

First, the Third Circuit leaves in place an unconstitutional law that has enabled a violent and expanding black market. PASPA has failed to prevent people from gambling on sports; all the Act has done is drive sports gambling underground. The AGA estimates that Americans illegally gamble $149 billion on sporting events each year, and much of that revenue is used to fund organized crime. By contrast, such

black markets for illegal sports gambling simply do not exist in countries with legal sports betting markets. When presented with a safe, legal market or an illicit alternative, consumers will almost always choose the former.

Second, the Third Circuit's decision forces States to ignore the growing public consensus in favor of reforming outdated sports-betting laws. Today, two-thirds of American sports fans and leading voices within law enforcement agree that States should have the autonomy to regulate intrastate sports betting, just as States currently have the authority to regulate lotteries, race betting, and casino-style gaming, including on the Internet.

Third, replacing PASPA's top-down mandate with state-by-state regulation will benefit consumers, law enforcement, professional and amateur sports, and local communities. First, and most importantly, experience in Nevada and other nations shows that regulated sports-betting markets all-but eliminate illegal sports gambling. Second, transitioning to regulated markets enables States to protect citizens who wager on sports, using consumer protection laws and other measures designed to prevent exploitation and abuse. Third, law enforcement can use the data and revenue generated by regulated sports betting to prevent and investigate corruption (such as match-fixing). Fourth, regulating sports betting will allow States to generate tax and tourism revenue to fund law enforcement, social services, and other matters of vital concern to States and local communities.

Finally, the Third Circuit's decision will deter other States from updating their sports-gaming laws. The Third Circuit's *en banc* decision creates substantial uncertainty regarding what—if any—reforms to state law PASPA permits. This will strongly discourage

other States from making attempts to modernize their own sports-gaming laws, allowing black markets for sports betting to grow, and the criminal enterprises they fund to spread.

States need the flexibility to address the economic and public safety implications of illegal gambling—issues of utmost local concern. If Congress wants to enact a federal prohibition that would be the responsibility of federal authorities to enforce, it has the power to do so, and it would be fully accountable for the policy consequences. But what the federal government cannot do is require the existence of *state* laws and commandeer *state* resources to enforce a misguided policy that the States want to abolish.

I. PASPA FORCES STATES TO ENFORCE A FAILED FEDERAL PROHIBITION ON SPORTS BETTING.

A State's ability to decide what its law is (and is not) is a "quintessential attribute of sovereignty" and precisely "what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). Indeed, protecting a State's autonomy to enact, enforce, and repeal its own laws as it sees fit protects individual rights and promotes democratic accountability. *New York*, 505 U.S. at 168–69, 181. By adopting a system of dual sovereignty, our Constitution embraces these principles and rejects a "'central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise *concurrent* authority over the people.'" *Alden v. Maine*, 527 U.S. 706, 714 (1999) (emphasis added) (quoting *Printz*, 521 U.S. at 919–20); *see* The Federalist No. 15, at 108 (A. Hamilton) (Clinton Rossiter ed., 1961).

For these reasons, this Court has "always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel *the States* to require or prohibit those acts." *New York*, 505 U.S. at 166 (emphasis added). Thus, for well over a century, it has been a central tenet of this Court's so-called anti-commandeering jurisprudence that Congress cannot "compel[ ] [the States] to enact and enforce a federal regulatory program," *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981), or "require the States to govern according to Congress' instructions," *New York*, 505 U.S. at 162. *See Coyle v. Smith*, 221 U.S. 559, 574–75 (1911) (Congress may not prohibit State from changing location of its capitol).

Thus, in *New York*, this Court held that Congress could not force States either to take title to low-level radioactive waste generated within their borders or to adopt federal standards regulating such waste. 505 U.S. at 174–77. Similarly, in *Printz*, this Court determined that Congress could not compel state law enforcement officials to perform background checks for would-be purchasers of firearms. 521 U.S. at 904–05. Even in cases in which this Court has rejected anti-commandeering challenges to federal law, it has stressed that Congress may not command States to "promulgate and enforce laws and regulations," *FERC*, 456 U.S. at 761–62, control or influence the manner in which States "regulate private parties," *Baker*, 485 U.S. at 514, or "require the States ... to regulate their own citizens." *Reno*, 528 U.S. at 151.

PASPA does precisely that. The Act enshrines a federal policy that, with a few grandfathered exceptions, makes sports betting illegal nationwide. But, rather than enacting this policy directly as a matter

of federal law, PASPA prohibits *States* from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]" sports betting. 28 U.S.C. § 3702(1). As interpreted by the Third Circuit, PASPA not only prohibits States from enacting laws that *authorize* sports gambling; it forces States to maintain laws (and accompanying enforcement apparatuses) that *prohibit* the practice. Pet. App. 10a–16a. Although the Third Circuit left open the possibility that *some* repeals or amendments may be acceptable, it gave no guidance to States on what those acceptable revisions may be. The practical effect of the Third Circuit's decision may well be to freeze in place all state laws prohibiting sports betting as they existed in 1992 (when PASPA was enacted) and lead States to hesitate to repeal or amend those laws, regardless of the will of their citizens or changing circumstances in their State.

This commandeers states' legislative and enforcement power. Under the Third Circuit's analysis, PASPA *compels* States to regulate their citizens in accordance with a federal standard. That is a textbook example of commandeering prohibited by the Tenth Amendment. *New York*, 505 U.S. at 166.

Absent PASPA, state laws addressing sports betting could be repealed or amended by the same state legislatures that enacted them. Thus, "[i]f the citizens of New [Jersey] ... do not consider that [prohibiting sports betting] is in their best interest, they may elect state officials who share their view." *Id.* at 168. And in fact, the voters of New Jersey have done just that. In 2011, 64% of New Jersey voters supported a referendum repealing New Jersey's constitutional ban on sports betting. Pet. App. 4a. In the years that followed, large majorities in the General Assembly and state Senate approved bills authorizing and, lat-

er, repealing the prohibition of sports betting at certain facilities within the State. Pet. App. 82a, 84a. The manifest purpose of these laws was to combat the "flourishing" black market for sports betting in New Jersey and to stimulate economic growth—both of which are matters of fundamental importance to the State and its citizens. *See* Pet. App. 10a–11a, 126a.

Under the Third Circuit's analysis, PASPA not only prevents the State of New Jersey from enacting laws that implement the policy preferences of nearly two-thirds of its citizens on these important issues; it commandeers the State legislature by forcing New Jersey to maintain state laws consistent with PASPA's federal standard. Thus, PASPA places the New Jersey Code in a time capsule of sorts, to be opened only by some future session of Congress. Until New Jersey receives such congressional imprimatur, the State must keep on its books a law it no longer wants and take responsibility for a policy it wishes to abandon.

It is axiomatic that Congress lacks authority to define state law, and the reasons for this rule transcend formalism or mere tradition. Depriving the body that enacted a law of the ability to repeal or amend that law defeats the purpose of representative democracy. As this Court recognized in *New York*, "[a]ccountability is ... diminished when ... state officials cannot regulate in accordance with the views of the local electorate." 505 U.S. at 168–69. The people of New Jersey, having overwhelmingly approved a ballot initiative allowing the legislature to repeal the State's sports betting prohibitions, will understandably be frustrated to learn that these state-law restrictions remain in effect. State officials will "bear the brunt of public disapproval, while the federal offi-

cials who devised [PASPA] remain insulated from the electoral ramifications of their decision." *Id.*

There is no dispute that Congress cannot directly compel New Jersey to enact a prohibition on sports betting. *See id.* at 166. It should follow, then, that Congress may not prevent New Jersey from repealing its sports-betting prohibition. After all, "preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring); *see also United States v. Butler*, 297 U.S. 1, 74 (1936) (Congress "may not indirectly accomplish" what it cannot accomplish directly).

The Third Circuit's contrary holding rests on the mistaken premise that PASPA does not commandeer state sovereignty because the law "does not command [the] states to take affirmative action." Pet. App. 23a. In other words, the Third Circuit suggests that prohibiting a State from repealing existing legislation is constitutionally different from requiring a State to enact new legislation. But this is akin to saying that shackles are not a restraint because they do not require the wearer to walk. The problem with PASPA is that it prohibits States from "tak[ing] affirmative action" to repeal or amend state laws their citizens no longer support. In so doing, PASPA necessarily commandeers state legislatures—it forces them to keep undesired state laws on their books. This subordination of state legislative authority to federal policy preferences treats the New Jersey Legislature as an outpost of Congress, and violates the Tenth Amendment.

PASPA also commandeers state enforcement mechanisms. Regardless of whether New Jersey takes

steps in a particular case to enforce its gambling laws, those laws will necessarily deter activity that the State wants to permit.

II. PASPA PREVENTS STATES FROM COMBATING ILLEGAL GAMBLING AND ORGANIZED CRIME.

The Third Circuit's decision is not just wrong; it is dangerous because it deprives States of the authority to combat illegal gambling. Although PASPA was passed with the salutary purpose of "stop[ping] the spread of ... sports gambling" and "maintain[ing] the integrity of our national pastime," S. Rep. No. 102-248, at 4 (1991), the Act does exactly the opposite. It enables an expanding black market and deprives law enforcement of the regulatory tools needed to address corruption and protect consumers. The Act also compels States like New Jersey to maintain outdated sports-betting laws enacted at a time when no one could imagine the Internet as a channel for illegal gambling. Because the Third Circuit's interpretation of PASPA did not include any guidance on the statute's scope, it ensures that PASPA is a major roadblock to state policymakers' efforts to experiment with solutions to the "widespread and violent" problem of illegal gambling.

A. PASPA Has Enabled A Thriving And Dangerous Black Market For Illegal Sports Betting.

PASPA has failed to stop people from betting on sports; all the Act has done is drive betters to black markets. Reliable studies have consistently found that Americans illegally wager hundreds of billions of dollars on sports every year. For example, as early as 1999, a federally commissioned study estimated that the market for illegal sports betting was between $80

billion and $380 billion per year, compared with just $2.3 billion wagered legally in Nevada. Nat'l Gambling Impact Study Comm'n, *Final Report* 2-14 (1999), http://govinfo.library.unt.edu/ngisc/reports/2.pdf. More recent reports estimate the annual market for illegal sports gambling to range from $149 billion to $500 billion. *See* Fact Sheet, Am. Gaming Ass'n, Sports Betting FAQs 1 (2016), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/56ba2181e707eb3d66686949/1455038849402/AGA-SportsBettingInAmerica-FAQ.pdf (hereinafter "*Sports Betting FAQS*").

Taking the $149 billion figure as a conservative estimate, the market for illegal sports betting in the United States last year was greater than the revenue of 491 of the *Fortune* 500 companies, and roughly equal to the combined revenue of Microsoft, Goldman Sachs, and Bristol-Myers Squib. Fortune Mag., *Fortune 500*, http://beta.fortune.com/fortune500/list (last visited Nov. 14, 2016). Americans' gambling habits are particularly concentrated around the nation's most popular sporting events. Americans wagered an estimated $4.2 billion on Super Bowl 50; 97% of those bets were made illegally. *Sports Betting FAQs*, at 1. Similarly, Americans wagered an estimated $9.2 billion on the 2016 NCAA men's basketball tournament, with only about 2.8% ($262 million) bet legally. Press Release, Am. Gaming Ass'n, March Madness Betting to Total $9.2 Billion This Year (Mar. 14, 2016), https://www.americangaming.org/newsroom/press-releasess/march-madness-betting-total-92-billion-year.

This black market quite simply does not exist in places, such as Nevada and the United Kingdom, where sports betting takes place legally rather than being prohibited outright. As the director of the

U.K.-based Sports Integrity Services reported at a law-enforcement summit hosted by the AGA, "[T]here is simply no demand for a black market" in the U.K. due to legalized market for sports betting in that country. Am. Gaming Ass'n Illegal Gambling Advisory Bd., *Law Enforcement Summit on Illegal Sports Betting: After-Action Report* 5 (2015) (hereinafter "*Law Enforcement Summit*"). And as demonstrated by subsequent presentations at the summit, transparent betting markets aid law enforcement, protect the integrity of sports, and have "shut[ ] down 85 percent of the illegal market overnight." *Id.* at 6, 10.

By contrast, illegal gambling in the United States enables and funds other illicit activity, including serious criminal enterprises. Criminologist Jay Albanese, for example, has reported that illegal gambling operations are ordinarily large, longstanding enterprises that use gambling proceeds to fund serious crimes, including money laundering, racketeering, human and drug trafficking, and extortion. Jay S. Albanese, *Illegal Gambling & Organized Crime: An Analysis of Federal Convictions in 2014*, at 4–5 (2015), http://stopillegalgambling.org/aga-assets/uploads/2016/03/Albanese_Illegal_Gambling_OC_Report_2014_cases_FINAL.pdf. The Chief of the FBI's Transactional Organized Crime Unit similarly remarked, "Most people don't understand the ties of organized crime to illegal sports betting. We see it every day at the FBI." *Law Enforcement Summit*, at 9. And in addition to funding organized crime, illegal sports-betting operations evade taxation (depriving the States of revenue), while their customers are effectively denied recourse to courts and consumer protection laws. *Infra* at 19–21.

As a consequence, leading voices in law enforcement agree that a policy shift is needed to address

this "widespread and violent" problem. *Law Enforcement Summit*, at 7. These leaders argue that illegal sports gambling could be more effectively curtailed if States had the ability to adopt sports-betting regulations tailored to meet the particular preferences and public safety concerns of their own citizens.

For example, Oakland County (Mich.) Sheriff Michael Bouchard, vice president of government affairs for the Major County Sheriffs' Association, stated, "We must bring illegal sports betting out of the criminal shadows. I think we need to regulate it. States should be allowed to opt in or out . . . ." *Id.* at 8. Colonel Mike Edmonson, superintendent of the Louisiana State Police, agreed that allowing States to legalize and regulate sports betting is "the smart thing to do." *Id.* And former Wisconsin Attorney General J.B. Van Hollen further stated, "Legalizing and regulating sports betting would help take money out of the black market and instead support legitimate business operations and strengthen game integrity." *Id.* at 10.

PASPA, however, paralyzes State efforts to modernize their sports-betting laws in this manner.

B. Public Attitudes Have Shifted In Favor Of Legalized Sports Wagering.

Dramatic changes in technology, professional sports, and public opinion have occurred since PASPA was adopted nearly a quarter-century ago. The Act does not address any of these changes, and does not give the States the flexibility they need to do so. Instead, States are made accountable for antiquated federal policy.

For example, at the time of PASPA's adoption, the World Wide Web was just three-years old, and the market for illegal sports betting consisted almost en-

tirely of small betting pools and brick-and-mortar, backroom sportsbooks. In the intervening years, the Internet has grown into a tremendous channel for commerce—both legal and illegal. A person in the United States can visit an offshore website and place a bet on virtually any American sporting event, just as easily as he or she could order a book from Amazon or a song from iTunes.

The sports world, too, has changed dramatically. Mixed-martial arts, a thriving form of professional sports that drives numerous legal and illegal bets, did not exist when PASPA was enacted, nor did several other sports leagues that are prominent in the United States today, including Major League Soccer and the Women's National Basketball Association. And all the while, sports betting has become far more socially acceptable.

In fact, public attitudes towards sports betting have shifted dramatically since 1992. A 1989 Gallup survey found that a majority of Americans opposed allowing States to legalize sports betting. Pew Research Ctr., *Gambling: As the Take Rises, So Does Public Concern* 12–13 (May 23, 2006), http://www.pewsocialtrends.org/files/2010/10/Gambling.pdf. Today, the opposite is true. Americans, particularly American sports fans, now generally support allowing States to decide for themselves whether to legalize and regulate sports betting within their borders. For example, in a Mellman Group survey of people who planned to watch the 2016 Super Bowl, 66% of respondents favored allowing States to decide whether to permit sports betting, while only 25% opposed such a change. Memorandum from the Mellman Grp. to the Am. Gaming Ass'n, Executive Summary of Our Recent Super Bowl Polling 2 (Feb. 2, 2016), https://static1.squarespace.com/static/5696d0f14bf118

aff8f1d23e/t/56b53fb8f8baf38a1584cb20/1454718905429/16mem205-f+public+Super+Bowl.pdf. The percentage of respondents in the survey who "strongly" favored permitting sports betting (48%) was nearly triple the percentage of respondents who "strongly" opposed change (17%). *Id.* In fact, support for regulated sports betting was consistent regardless of the respondent's age, income, gender, party affiliation, or religion. *Id.*

The public's support for legalized sports betting is further demonstrated by Americans' betting habits. It is estimated that over 40 million Americans bet on a sporting event within the last year. Nielsen Sports, *Legal Sports Betting: What It Would Mean for NFL TV Partners & Advertisers* 8 (Sept. 2016), https://www.americangaming.org/sites/default/files/Nielsen_NFL_Betting.pdf. Another study found that half of all respondents who watch at least two National Football League games per week had bet—most often illegally—on sports in the preceding year). The Mellman Grp., *National Super Bowl Survey* tbl.2-1 (Jan. 25–28, 2016).

This growing acceptance of sports betting co-occurred with a period of dramatic growth in the gaming industry. Since PASPA's enactment, revenue from commercial gaming has increased from $9.72 billion in 1992 to $38.54 billion last year—a 266% increase. Over that same time period, the number of states with commercial casinos has tripled from eight in 1992 to twenty-four today. Tribal gaming has seen an even more dramatic surge in growth. In 1992, just a handful of states with Class III Indian casinos were in operation. Today, tribal gaming is in twenty-eight states across the country and revenues reached nearly $30 billion last year—an increase of 1,731% from 1992 when total revenues at Class II and III casinos

were just $1.63 billion. *See Gross Annual Wager*, Int'l Gaming & Wagering Bus. Mag., Aug. 5, 1994.[2]

In addition to the public writ large, States themselves want to experiment with sports betting as a means of combating crime, incentivizing tourism, and generating tax revenue. *See* Joe Drape, *Cash-Hungry States Eye Sports Betting, to Leagues' Dismay*, N.Y. Times (Mar. 27, 2013), http://www.nytimes.com/2013/03/28/sports/more-states-look-to-get-in-the-sports-betting-game.html; *see also* Daniel L. Wallach, Introduction, Game-Changers: The States' Big Gamble on Legalized Sports Betting 27 (Aug. 10, 2014), http://www.bplegal.com/webfiles/pdf/game_changer.pdf. Yet under the Third Circuit's opinion, States are not only precluded by PASPA from undertaking most alternative approaches to sports wagering, but have no guidance regarding which approaches are permissible and which will simply lead to expensive and ultimately unsuccessful litigation. PASPA thus effectively prevents States from any experimentation and instead forces them into the service of an outdated and failed federal prohibition.

To be sure, if Congress wishes to enact a law that runs contrary to the interests of the public, it may try to do so. But enforcement mechanisms are constitutionally significant. And what the federal government cannot do is pass the buck to the States, commandeer their enforcement apparatuses, and make them responsible for a policy they wish to eliminate.

---

[2] Data on the current size of the gaming industry gathered from state gaming commissions and control boards and the National Indian Gaming Commission.

C. A Blanket Prohibition On Sports Betting Interferes With States' Traditional Authority Over Gaming.

By compelling States to enforce a federal policy on sports betting, PASPA deprives States of any flexibility to address the mounting evidence and an emerging consensus that legalized sports betting is a more effective way to combat illegal gambling and associated crimes than the total prohibitions maintained by many States under PASPA's framework today.

This is not only unconstitutional but highly unusual. Traditionally, gaming regulation has been a matter of state and local concern. With the exception of PASPA, Congress historically has limited the federal role in this area to supporting the States' enforcement of their own gaming laws. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 187 (1999) (federal policy is "to defer to, and even promote, differing gambling policies in different States"). For example, the Illegal Gambling Business Act (IGBA), 18 U.S.C. § 1955, authorizes the federal prosecution of multi-state illegal gambling conspiracies, but does not provide a federal definition of "illegal gambling business." Instead, it prohibits only activities that operate in violation of *state* anti-gambling laws. *Id.* § 1955(b)(1)(i). Enacted in 1961 to target La Cosa Nostra, the federal Wire Act, 18 U.S.C. § 1084, similarly exists to prosecute illegal sports betting activities that are beyond the reach of any one State. Thus, with the exception of PASPA, Congress historically has recognized that approaches to gaming implicate important and complex questions of public health, safety, and morality best addressed by States.

PASPA contradicts this tradition of federal deference to state gaming laws, which would allow States,

working in coordination with local law enforcement and sports leagues, to develop safe and effective sports-betting regulations that accord with local opinion and local needs. As construed in *Christie I*, PASPA at least retained some potential to allow States limited discretion to decide on the contours of their gambling laws through determining which laws to repeal and which to maintain. Under the *en banc* Third Circuit's analysis in *Christie II*, however, PASPA effectively eliminates all meaningful opportunity for State participation in shaping the contours of regulation of sports gaming by declaring New Jersey's partial repeal unlawful, and providing no guidance regarding how PASPA will apply to any future state laws.

D. The Third Circuit's Decision Creates Uncertainty That Will Deter States From Attempting Popular And Necessary Regulatory Reforms.

There are manifold benefits to allowing States to reform their sports-betting laws to reflect modern technology, public opinion, and local economic and law enforcement needs.

For example, permitting sports betting to occur legally will better protect consumers. People who place bets in an illegal market cannot rely on consumer protection laws or even basic principles of contract enforcement. As a result, those citizens—particularly low-income and otherwise disadvantaged individuals—are susceptible to exploitation. Removing sports betting from the shadows will allow States to better protect these individuals, by enabling them to rely on general consumer protection laws and to enforce gaming contracts in courts of law. In addition, States will be able to devise betting policies that are particular to specific sports, ensuring the best protections for

the consumers that wager on those events, and address public health concerns associated with problem gambling.

Conducting sports betting in the open will also permit local law enforcement to access vital information necessary to identify and prosecute match-fixing and organized crime. Gaming operators can "provide an early warning system" of "irregularities" that may be evidence of corruption. *Law Enforcement Summit*, at 6 (statement of Karl Bennison, Chief of Enforcement for the Nevada Gaming Control Board). For example, during the 2016 Australian Open tennis tournament, a legal sportsbook in that country identified an unusual amount of bets being placed on a mixed doubles match. This discovery led to allegations that a pair of tennis players purposefully lost their match as part of a gambling conspiracy. This scandal may have never been uncovered without the large amounts of data generated by lawful sports-betting operations. *See* Ben Rothenberg & James Glanz, *Match-Fixing Suspicions Raised at Australian Open After Site Stops Bets on Match*, N.Y. Times (Jan. 24, 2016), http://www.nytimes.com/2016/01/25/sports/tennis/match-fixing-australian-open-mixed-doubles-betting. html. By contrast, in the United States, where the vast majority of sports wagering occurs on black markets—and outside law enforcement's view—match-fixing is usually uncovered inadvertently and only after the damage has been done. Brian Tuohy, *Larceny Games: Sports Gambling, Game Fixing and the FBI* 17 (2013) (reporting that 2007 point-shaving scandal involving NBA referee Tim Donaghy was discovered "purely by accident" from wiretaps in an "unrelated [FBI] organized crime case").

Finally, legalized sports betting offers States the potential to generate substantial revenue to benefit local communities. According to one report, in 2012, Nevada collected between $15 and $20 million in tax revenue from sports betting. *See* Drape, *supra*. The State, likewise, generates hundreds of millions of dollars in tourism revenue from people traveling to Nevada to wager on sports. *See* Wallach, *supra*, at 2 (reporting that 2014 Super Bowl, which was played in New Jersey, attracted 310,000 visitors and 106.2 million in non-gaming revenue to Las Vegas). By contrast, the hundreds of billions of dollars wagered in States where sports betting is illegal go largely untaxed, and are instead funneled to offshore companies and local criminal enterprises. If sports betting were legalized and activities related to it were taxed, state and local governments could direct a portion of the revenue to law enforcement, social services, and other matters of vital local interest.

State efforts to take these positive steps forward may well be chilled by the Third Circuit's *en banc* decision. Prior to that decision, other States were considering their own proposals to legalize and regulate sports betting. *See, e.g.*, *id.* at 27. Mississippi, for example, commissioned a Task Force on Internet Gaming and Sports Betting to consider the issue. State Task Force on Internet Gaming & Sports Betting, *Report on Internet Gaming and Sports Betting* 19 (Dec. 2014), http://msgaming.org/wp-content/uploads/2015/05/MGHA-Report-on-Internet-Gaming-and-Sports-Betting.pdf. But the Third Circuit's rulings have deterred those efforts. As the Mississippi Task Force concluded after *Christie I*, "[t]he steps to legalize Sports Betting are not known as of yet." *Id.* Two Third Circuit decisions later, the steps States can take to address illegal gambling and promote

safe, regulated wagering practices are even less clear. The Third Circuit provides States with no guidance regarding what—if any—reforms to state law will be tolerated.

For example, the court left open the possibility that PASPA might permit States to completely deregulate sports betting or to authorize "*de minimis* wagers between friends and family." Pet. App. 24a. However, between complete deregulation and friends-and-family betting pools, the Third Circuit provides no guidance whatsoever on the extent to which States may modernize their sports-betting laws.

This lack of clarity presents States with a strong disincentive to take action to combat illegal gambling within their borders, especially because States know that any attempt to amend their existing gaming restrictions will be met with fierce opposition from special interests, as this litigation powerfully demonstrates. The adverse consequences of this inaction will only grow. Illegal sports betting, particularly on the Internet, is undoubtedly a growth sector. And black markets for sports betting within the States, likewise, will continue to thrive under PASPA's broken regulatory framework. The emergence of new forms of sports betting like DFS, which state attorneys general have struggled to classify or regulate under existing gaming laws, further demonstrates the need for modern gaming regulations. *See, e.g.*, Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 Harv. J. Sports & Ent. L. 277 (2016).

These Petitions, therefore, present fundamental questions about States' sovereignty to define their own laws and combat crime within their own borders. The Court should grant the Petitions because the

Third Circuit's decision is dangerous, both to the principle of dual sovereignty and to States struggling to combat the deleterious effects of black-market sports betting.

CONCLUSION

For the foregoing reasons, the Petitions should be granted.

Respectfully submitted,

JONATHAN F. COHN*
BRIAN P. MORRISSEY
DANIEL J. HAY†
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005
(202) 736-8000
jfcohn@sidley.com

Counsel for Amicus Curiae

November 14, 2016 * Counsel of Record

---

† Mr. Hay is admitted only in New York and is practicing law in the District of Columbia pending application for admission to the D.C. Bar and under the supervision of principals of the firm who are members in good standing of the D.C. Bar.